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2 CZ SERVICES, INC., et al.,
3 Plaintiffs,
4 v.
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7 EXPRESS SCRIPTS HOLDING
COMPANY, et al.,
8

9 Defendants.
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Case No. [3:18-cv-04217-JD](#)

ORDER RE EQUITABLE CLAIMS

11 A long-running dispute between plaintiffs CZ Services, Inc. and CareZone Pharmacy LLC
12 (CZ), and defendants Express Scripts Holding Company and Express Scripts, Inc. (ESI), was tried
13 by a jury in February 2022. The jury found against CZ on all of its claims against ESI, namely
14 defamation, violations of the Lanham Act, trade libel, intentional interference with prospective
15 economic relations, and negligent interference with prospective economic relations. Dkt. No. 551.
16 The jury found against ESI on all of its counterclaims against CZ and its CEO, Jonathan Schwartz,
17 for breach of contract and promissory fraud. *Id.* In effect, the jury declared a plague upon both
18 parties' houses. The Court entered judgment on the verdict on March 22, 2022, and the time for
19 appeal has passed. Dkt. No. 560.

20 The verdict and judgment disposed of the bulk of the claims between CZ and ESI. A few
21 equitable tail ends were not specifically addressed in the verdict, and CZ has inquired about their
22 status. *See* Dkt. No. 563. These relate to CZ's equitable claims under the Tennessee Any Willing
23 Provider (AWP) statute, and the Tennessee and California unfair competition laws.

24 The Court has written extensively on the AWP claim, and determined that the statute does
25 not apply to ESI. *See* Dkt. No. 92 (order denying TRO); Dkt. No. 333 (order re summary
26 judgment). In pertinent part, the plain text of the AWP statute makes clear that the Tennessee
27 legislature intended to regulate only entities that are a "health insurance issuer" and a "managed
28 health insurance issuer." *See* Dkt. No. 333 at 9. ESI is a pharmaceutical benefits manager (PBM),

which is not a health insurance issuer within the meaning or scope of the AWP. *Id.* at 9-10. Every court that has examined the application of other AWP statutes to PBMs has reached the same conclusion, and a few states have overcome that hurdle by expressly including PBMs in their AWP statutes. *Id.* at 10. Tennessee is not one of those jurisdictions, and CZ never made a good argument justifying the application of the Tennessee statute to ESI. For this and other related reasons, the Court denied CZ's application for a TRO based on the Tennessee AWP, and largely gutted the AWP claim on summary judgment in ESI's favor. *Id.* at 9-12; Dkt. No. 92 at 3.

The only remnant of the AWP claim left open for further proceedings was whether ESI had voluntarily agreed in its contracts to be bound by the Tennessee AWP statute, even though it was under no legal obligation to do so. On summary judgment, CZ tendered a few contracts between ESI and the University of Pittsburgh Medical Center, Highmark, Medical Mutual of Ohio, and Wellpoint, which were said to show that ESI had agreed to comply with AWP laws in states other than Tennessee. *See* Dkt. No. 273-4 at 6 (CZ's summary judgment brief); *see, e.g.*, Dkt. No. 273-17 (UPMC); Dkt. No. 273-16 (Highmark); Dkt. No. 273-18 (Medical Mutual); Dkt. No. 273-19 (Wellpoint). CZ also tendered a contract between ESI and BlueCross/BlueShield of Tennessee (BCBST), which was the only contract that mentioned the Tennessee AWP law. Dkt. No. 273-14. Based on this record, thin though it was, the Court let the question go forward of whether ESI voluntarily committed itself to complying with the Tennessee AWP.

In initial pretrial discussions with the parties, the Court expressed a tentative inclination to take up any equitable claims separately after a jury trial of the legal claims. *See* Dkt. No. 505 30:15-18. Upon further consideration, the Court directed the parties to present all of their evidence for their claims, legal or equitable, during the jury trial. *See* Dkt. No. 519 31:3-14; Dkt. No. 533 655:17-659:14. This was intended to utilize the jury as the fact finder for issues common to the legal and equitable claims. *See* Fed. R. Civ. P. 39; *Tull v. United States*, 481 U.S. 412, 425 (1987). As a result, CZ had ample notice and opportunity to adduce evidence during the jury trial that ESI had agreed to comply with the Tennessee AWP. *See* Dkt. No. 543 at 882-95.

The evidence CZ presented at trial was vanishingly slight. CZ proffered just the one contract between ESI and BCBST, which counsel for CZ expressly described as the contract that

1 ostensibly established ESI's liability under the AWP laws. TX-0082 (Dkt. No. 273-14). The
2 Court pressed CZ several times on whether it had any other contracts or testimony to establish that
3 ESI voluntarily agreed to be bound by the AWP laws. *See* Dkt. No. 543 at 885:23-886:3; 886:12-
4 16; 887:18-22; 889:4-17. No evidence other than the one BCBST contract was presented.

5 The problem for CZ is that this contract does not establish that ESI has agreed to take on
6 the requirements of the Tennessee AWP statute. The contract states that "ESI accepts
7 responsibility for performing contracted services and understands BCBST will provide oversight
8 of contracted services based on all applicable BCBST standards, policies, business principles,
9 Federal and State regulations instructions and letter rulings." Dkt. No. 273-14 Sched. E § 1.1.
10 The Tennessee AWP law is included in a list of statutes to which the provision applies. *Id.* But
11 this clause is hardly tantamount to an express statement by ESI that it agreed to comply with the
12 Tennessee AWP. At best, it says only that BCBST is responsible for compliance, which was
13 consonant with the fact that the AWP statute applies to health insurers like BCBST, and not PBMs
14 like ESI. CZ did not sponsor any testimony at trial to the effect that this clause made ESI
15 responsible for the Tennessee AWP requirements. To the contrary, CZ represented to the Court
16 that there was no evidence that ESI ever told CZ that it was bound under the BCBST contract to
17 follow the Tennessee statute. Dkt. No. 543 892:19-893:5.

18 Consequently, after a full and fair opportunity to present evidence that ESI volunteered to
19 comply with the Tennessee AWP statute, CZ came up well short. No further proceedings on the
20 issue are warranted.

21 So too for the Tennessee and California unfair competition claims. In Tennessee, an unfair
22 competition claim requires conduct that amounts to a recognized tort, and deprives the plaintiff of
23 economic prospects. *See, e.g., B&L Corp. v. Thomas & Thorngren*, 162 S.W.3d 189, 216 (Tenn.
24 Ct. App. 2004); *Dominion Enters. v. Dataium, LLC*, No. M2012-02385-COA-R3-CV, 2013 WL
25 6858266, at *7 (Tenn. Ct. App. Dec. 27, 2013) ("[A] claim of unfair competition also requires an
26 underlying tort.") (unpublished). The Tennessee claim survived summary judgment because
27 potential underlying tort claims, such as defamation, also survived. Dkt. No. 333 at 13. The
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1 verdict closed that door. The jury found against CZ on all of its tort claims. Consequently, the
2 Tennessee unfair competition claim lacks an essential element.

3 For the California Unfair Competition Law (UCL), unfair competition is defined as “any
4 unlawful, unfair, or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. For the
5 reasons stated in the summary judgment order, the Tennessee AWP statute cannot be the basis of a
6 UCL claim. *See* Dkt. No. 333 at 14 (citing *Sullivan v. Oracle Corp.*, 51 Cal.4th 1191, 1207
7 (2011)). The Court allowed the UCL claim to go forward on the basis of the alleged defamation
8 and the interference torts, but the jury verdict against CZ on those counts shuts down this avenue,
9 too.

10 The Court also left open a sliver of a UCL unlawfulness claim predicated on a violation of
11 the Medicaid AWP statute, 42 U.S.C. § 1396a(a)(23), which states that a State plan for medical
12 assistance must provide for any eligible person to obtain care from any qualified provider and that
13 choice of provider will not be restricted. *See* Dkt. No. 333 at 14. To be clear, the Medicaid AWP
14 is a federal statute that is entirely distinct and separate from the Tennessee AWP state law
15 discussed so far. During summary judgment, CZ tendered an ESI policy said to show that ESI
16 would comply with the Medicaid AWP law. Dkt. No. 273-26 (Medicaid - Any Willing Provider
17 Policy). But at trial, CZ did not proffer any evidence establishing that ESI operated as a State
18 Medicaid plan, or had otherwise voluntarily assumed the requirements of the Medicaid AWP
19 statute. CZ did not even tender at trial the ESI policy it had cited in the summary judgment
20 proceedings, *see* Dkt. No. 552 at 3 (admitted trial exhibits), or any evidence whatsoever indicating
21 that ESI might have been subject to by the Medicaid AWP statute.

22 As the overall record demonstrates, there is nothing left in the case that might warrant
23 post-verdict proceedings. Judgment will be entered against CZ on the AWP and unfair
24 competition claims.

25 **IT IS SO ORDERED.**

26 Dated: August 24, 2022



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28 JAMES DONATO
United States District Judge